A **KEAN YICK ENTERPRISE SDN BHD**

v.

CHERATING DEVELOPMENT SDN BHD & ANOR AND OTHER CASES

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HIGH COURT MALAYA, KUALA LUMPUR
LAU BEE LAN J
[CIVIL SUITS NO: S22-1206-2006, S22-1207-2006, S22-1208-2006, S22-1209-2006]
C 22 OCTOBER 2011

CONTRACT: *Sale and purchase of property - Failure to complete - Developer abandoned project - Third party undertook to complete project - Purchasers sued developer and third party for specific performance and* D *damages for late delivery - Privity of contract - No agreement between third party and purchasers - Purchasers' dealings with developer not known to third party - Purchasers unable to prove payment of purchase price - Whether purchasers could obtain specific performance against third party - Whether purchasers' agreement with developer void for want of* E *consideration - Evidence Act 1950, ss. 32(1)(b) & 73A - Contracts Act 1950, s. 26*

The plaintiffs in all the suits had signed the sale and purchase agreements ('SPAs') with the first defendant ('Cherating') to F purchase properties in a project developed by Cherating. Cherating covenanted to deliver vacant possession of the properties to the plaintiffs within 36 months of the date of the SPAs failing which it would pay liquidated and ascertained damages for late delivery. The plaintiffs claimed that they had paid the full purchase price for G the properties to Cherating and sought to admit into evidence at the trial, three acknowledgement receipts ('the impugned letters') Cherating had allegedly issued to them as proof of full payment. Shortly after the SPAs were executed, Cherating was wound-up and the project was abandoned. Following an agreement between Cherating, the project's financier and the second defendant H ('Woolley'), Woolley undertook to take over and complete the project provided all existing purchasers agreed to the arrangement. Woolley then signed fresh sale and purchase agreements with a substantial number of the purchasers but did not sign any I agreement or document with the plaintiffs as they were not in the list of buyers Cherating had supplied to Woolley. Cherating also did not inform Woolley about the SPAs it had signed with the

plaintiffs or about any payment towards the purchase price that they had made. The plaintiffs filed the instant suits seeking specific performance of the SPAs and damages for late delivery. They sued Woolley on the premise that it was Cherating's successor in title or permitted assign - a contention which Woolley denied. Woolley also submitted that it was not bound by the SPAs as it was not a party to those agreements. The action filed by Lau Kim Piaw (Suit No: S22-1207-2006) was excluded from the trial as the plaintiff had died before the trial date.

Held (dismissing the plaintiffs' claim with costs):

(1) The plaintiffs had not proven that they had fully paid for the properties. Their only witness, PW1, did not have personal knowledge of the payment as he had claimed. Further, he was not a credible witness and gave inconsistent evidence. (paras 15 & 20)

(2) The SPAs were void for want of consideration pursuant to s. 26 of the Contracts Act 1950 and were unenforceable. (para 35)

(3) There was no privity of contract between the plaintiffs and Woolley. The exception to that doctrine *ie*, that a stranger to a contract who enjoyed the benefits of a contract must also accept the burden under it, did not apply here as Woolley never received the purchase price (the benefit) which the plaintiffs alleged they paid to Cherating. (paras 45 & 51-52)

(4) The impugned letters were not admissible in evidence as the plaintiffs did not adduce evidence to show that the exceptions to ss. 73A & 32(1)(b) of the Evidence Act 1950 applied. (para 29)

Case(s) referred to:

Allied Bank (Malaysia) Sdn Bhd v. Yau Jiok Hua [2006] 3 CLJ 27 CA ***(refd)***

Amalcon Engeneering Sdn Bhd v. Saw Chong Teok Quarry Sdn Bhd [2010] 1 LNS 485 HC ***(refd)***

Bank Utama (Malaysia) Berhad lwn. Syrene Holdings Sdn Bhd & Yang Lain [2010] 1 LNS 1526 HC ***(refd)***

Bespile Sdn Bhd v. Asianshine Sdn Bhd & Ors [2010] 1 LNS 336 HC ***(refd)***

EON Finance Berhad v. United Bintang Machinery Sdn Bhd [2010] 1 LNS 349 HC ***(refd)***

Everise Hectares Sdn Bhd v. Citibank Bhd [2011] 2 CLJ 25 CA ***(refd)***

Golden Vale Golf Range & Country Club Sdn Bhd v. Hong Huat Enterprise Sdn Bhd [2008] 6 CLJ 31 CA ***(refd)***

Halsall And Others v. Brizell and Another [1957] 1 All ER 371 ***(refd)***
Honest Deal Sdn Bhd v. Convenience Shopping Sdn Bhd [2010] 10 CLJ 147 HC ***(refd)***
JB Securities Sdn Bhd v. Goh Song Leong & Anor [2010] 1 LNS 11 HC ***(refd)***
Kay Hian Pte Ltd v. Ma Boon Lan [2003] 3 CLJ 722 CA ***(refd)***
Kubota Agricultural Machinery Sdn Bhd v. Sharizan Sdn Bhd & Anor; Sharizan Sdn Bhd & Ors (Third Parties) [2001] 6 CLJ 104 HC ***(refd)***
Lim Guan Eng v. PP [2000] 2 CLJ 541 FC ***(refd)***
Praccom Sdn Bhd v. Malaysian Timber Council & Anor [2010] 1 LNS 1307 HC ***(refd)***
Rhone and Another v. Stephens (Executrix of May Ellen Barnard, deceased) [1994] 2 AC 310 ***(refd)***
Sundram Ramasamy v. Arujunan Arumugum & Anor [1994] 4 CLJ 300 SC ***(refd)***
Tan Mooi & Ors v. Tengku Mohd Saad & Ors And Other Appeals [2011] 2 CLJ 145 FC ***(refd)***
Tito v. Waddell (No. 2) [1977] 3 All ER 129 ***(refd)***
Woolley Development Sdn Bhd v. Mikien Sdn Bhd [2008] 2 CLJ 303 CA ***(refd)***
Yew Cheng Lim v. Regal Marketing & Trading Sdn Bhd [2011] 5 CLJ 472 HC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 26
Evidence Act 1950, ss. 32(1)(b), (c), 73A, 103
Rules of the High Court 1980, O. 81

Evidence Act [India], s. 32(2)

Other source(s) referred to:
Judith Sihombing, *"Malaysian Conveyancing"* Binder 2, Issue 25 Division VI "Commentary on Conveyancing Matters", paras 603-605

For the plaintiffs - Goik Kenzu; M/s Nasir, Kenzin & Tan
For the 2nd defendant - Prakash Lachimanan; M/s Mathews Hun Lachimanan

Reported by Ashok Kumar

JUDGMENT

Lau Bee Lan J:

[1] Originally there were four suits involved in this trial, namely S22-1206-2006, S22-1207-2006, S22-1208-2006 and S22-1209-2006. S22-1207-2006 was consolidated with S22-1206-2006 *vide* court order dated 17 June 2010 whilst S22-1208-2006 and

S22-1209-2006 were respectively consolidated with S22-1206-2006 *vide* court order dated 10 October 2007. The trial was scheduled on 4 to 5 April 2011. On 29 March 2011 at case management stage, the court was informed that the plaintiff in S22-1207-2006 had passed on. Initially there was a concession by the defendants that the decision in the three other suits will bind S-22-1207-2006. However on 4 April 2011 counsel for the defendants informed the court that the concession was erroneous as the retainer of counsel expired with the death of the said plaintiff, Lau Kim Piaw. Counsel for the estate of Lau Kim Piaw (deceased) intended to make the necessary arrangements for the substitution of the parties.

[2] Agreeing with the position taken by the defendants, and with a view to allow the estate of Lau Kim Piaw (deceased) to make the necessary arrangements for the substitution of the parties in S22-1207-2006, the court fixed S22-1207-2006 for mention on 13 June 2011. The court thus proceeded with the trial of the three other suits ie, S22-1206-2006, S22-1208-2006 and S22-1209-2006.

[3] The plaintiffs' pleaded case is pursuant to the sale and purchase agreements all of which are dated 5 November 1998 ("SPAs"), the plaintiffs had agreed to purchase a total of three units of shoplot, (comprising of Ground, 1st, 2nd and 3rd Floor) namely, (i) Parcels No. 66, Phase 2, Ground, 1st, 2nd and 3rd Floor; (ii) Parcels No. 65, Phase 2, Ground, 1st, 2nd and 3rd Floor; and (iii) Parcels No. 95, Phase 2, Ground, 1st, 2nd and 3rd Floor ("properties") at a development known as Raja Uda Commercial Centre ("project") from Cherating Development Sdn Bhd, the 1st defendant ("Cherating").

[4] Pursuant to the terms of the said SPAs, Cherating agreed to deliver vacant possession of the properties within 36 months of the date of the SPAs and that Cherating shall be liable to pay liquidated and ascertained damages at rate of 11% per annum for delay in delivering vacant possession.

[5] That the plaintiffs had paid Cherating the total purchase price of the said properties.

[6] Woolley Development Sdn Bhd ("Woolley"), the 2nd defendant had taken over the development and therefore pursuant to cl. 38(f) and 41 of the said SPAs, Woolley is bound by the said SPA(s).

[7] It is the plaintiffs' case that the defendants have breached the terms of the SPAs by failing to deliver vacant possession within the stipulated time period.

[8] The plaintiffs seek to enforce the SPAs by claiming for amongst others the following reliefs:

(i) a declaration that Woolley is bound by the terms of the said SPAs;

(ii) order for specific performance of the said SPAs against Cherating and/or Woolley to deliver vacant possession of the said properties;

(iii) alternatively damages in addition to or *in lieu*;

(iv) judgment for a quantified sum of RM369,554.79, RM369,554.79 and RM673,772.30 for liquidated damages for late delivery of vacant possession as at 30 April 2006;

(v) judgment for an unquantified sum for liquidated damages for late delivery of vacant possession from 1 May 2006 calculated at 11% per annum until date of delivery of vacant possession;

(vi) interest at a rate of 8% per annum on liquidated and ascertained damages from date of filing of writ until full settlement; and

(vii) costs.

[9] The 2nd defendant, Woolley's defence is as follows:

(i) Cherating is the registered proprietor of the parcels of land that is being developed as the said project and sometime in 1998 Cherating failed and/or defaulted in developing the said properties and the said development project was abandoned for some time. After a number of negotiations between Cherating and the project financier Malaysia Building Society Berhad ("MBSB"), Woolley offered to rehabilitate and complete the project;

(ii) By an agreement for transfer of land dated 20 September 2000 and a novation agreement entered between Cherating, MBSB and Woolley, subject to the terms thereof, Woolley agreed to rehabilitate and complete the said project;

(iii) Woolley's obligation to rehabilitate and complete the project pursuant to the agreement for transfer of land is conditional upon amongst others the existing purchasers' giving their consent and/or or agreement to permit Woolley to complete the project by executing a novation;

(iv) The plaintiffs were not amongst the list of purchasers provided by Cherating;

(v) Woolley has no knowledge of the alleged payment of full purchase price of the said Properties;

(vi) The plaintiffs did not execute any agreement with Woolley and therefore there is no legally binding relationship between the plaintiffs and Woolley;

(vii) Woolley therefore denies being bound by the terms of the said SPAs.

[10] It is undisputed:

(a) that Cherating is the registered proprietor of the land on which the project is being developed ("the land");

(b) that the project was abandoned by Cherating since 1998 and pursuant to an agreement for transfer of land dated 20 September 2000, Woolley agreed to rehabilitate and to continue to develop and complete the project subject to the terms and conditions therein.

(c) that the plaintiffs did not execute any agreement or document with Woolley.

Issues

[11] The parties' agreed issues to be tried is marked as "F". Be that as it may I am of the view broadly the issues to be determined by the court are:

(a) whether there is a valid and enforceable contract between the plaintiffs and Woolley, the 2nd defendant; and

(b) whether there is privity of contract between plaintiffs and Woolley, the 2nd defendant.

Findings

Whether There Is A Valid And Enforceable Contract?

[12] The plaintiffs had only one witness in the person of PW1, Mr. Lau Kim Lai, the director of all three plaintiffs namely, Kean Yick Enterprise Sdn Bhd (Suit S22-1206-2006), Aidai Timber Products Sdn Bhd (S22-1208-2006) and Kean Yick Holdings Sdn Bhd (S22-1209-2006). PW1 testified in examination in chief that:

(a) He executed all the three SPAs made between the 1st defendant and the following plaintiffs in respect of the project, namely:

(i) Kean Yick Enterprise Sdn Bhd for parcels No. 66 Phase 2, ground, 1st, 2nd and 3rd floor (exhs. P1-P4);

(ii) Aidai Timber Products Sdn Bhd for parcels No. 65 Phase 2, ground, 1st, 2nd and 3rd floor (exhs. P7-P10); and

(iii) Kean Yick Holdings Sdn Bhd for parcels No. 95 Phase 2, ground, 1st, 2nd and 3rd floor (exhs. P13-P16).

PW1 stated he was authorised to sign the SPAs listed as (i), (ii) and (iii) above based on the directors' resolutions dated 9 October 1998 (IDP50 in bundle D2 p. 424), IDP6 in bundle D2 p. 449) and IDP12 in bundle D2 p. 481).

(b) He made full payments for the properties by way of part payment in cash and contra with goods delivered by the plaintiffs to the 1st defendant which was arranged by his brother, Mr Lau Kim Piaw, the plaintiff in S22-1207-2006 and was the other director of the plaintiff companies in all the four suits. According to PW1 whatever invoices and evidence of the payment was personally known to Mr Lau Kim Piaw who at the time of the trial had passed on. PW1 thus relied on three letters of acknowledgment receipt of full payment dated 15 October 1998 (IDP5, IDP11 and IDP17) by the 1st defendant to the plaintiffs in respect of the SPAs by Kean Yick Enterprise Sdn Bhd, Aidai Timber Products Sdn Bhd and Kean Yick Holdings Sdn Bhd respectively.

(c) The plaintiffs have the financial capability to purchase the properties and reference is made to the plaintiffs' financial statements of (i) Kean Yick Enterprise Sdn Bhd (1998) (bundle D2 pp. 426-436) (IDP24); (ii) Kean Yick Enterprise

Sdn Bhd (1999) (Bundle D2 pp. 437-447) (IDP25); (iii) Aidai Timber Production Sdn Bhd (1998) (bundle D2 pp. 451-465) (IDP26); (iv) Aidai Timber Production Sdn Bhd (1999) (bundle D2 pp. 466-480a) (IDP27); (v) Kean Yick Holdings Sdn Bhd (1998) (bundle D2 pp. 483-494) (IDP28) and (vi) Kean Yick Holdings Sdn Bhd (1999) (Bundle D2 pp. 495-507) (IDP29). A B

[13] The plaintiffs contended that three letters of acknowledgment receipt dated 15 October 1998 (IDP5, IDP11 and IDP17 or "impugned letters" as the case maybe) are admissible as proof that the plaintiffs had fully paid for the properties as: C

(a) (i) IDP5, IDP11 and IDP17 were issued nearly 13 years ago and was issued by Cherating even before any dispute arose between the parties;

D

(ii) the court should accept the evidence of PW1 that he personally saw the letter during the signing of the SPAs;

(iii) Cherating had been wound up earlier and a liquidator was appointed in 2008 which made it harder to produce the maker; and E

(iv) it is safe for the court to come to the irrebuttable conclusion that the person who executed the impugned letters is the same person as the person who signed the agreement for transfer of land as 1st defendant's director (signature on the right in bundle C1 p. 18) based on the evidence of DW2, Woo Yew Khuen who in cross-examination agreed that on comparison, the signatures looked similar. F

G

(b) The 2nd defendant despite objection to the admissibility of the impugned letters has failed to provide any proof or witness to contradict or establish any allegation of fraud or forgery.

(c) The 2nd defendant has failed to adduce any evidence that IDP5, IDP11 and IDP17 is a fraud or forgery, hence has not discharged its evidential burden of proof under s. 103 of the Evidence Act 1950. The case of *Sundram Ramasamy v. Arujunan Arumugum & Anor* [1994] 4 CLJ 300 (SC) was cited. H

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(d) That IDP5, IDP11 and IDP17 is not hearsay evidence but direct evidence as it was addressed specifically to the 1st defendant ie, PW1. Even if it is hearsay, IDP5, IDP11 and IDP17 is admissible as it is within the exception of s. 32(1)(b) & (c) of the Evidence Act and s. 73A of the same in that the document comes within "the ordinary course of business". The Federal Court case of *Tan Mooi & Ors v. Tengku Mohd Saad & Ors and Other Appeals* [2011] 2 CLJ 145 was cited. Other cases cited were *Yew Cheng Lim v. Regal Marketing & Trading Sdn Bhd* [2011] 5 CLJ 472 (HC); *Allied Bank (Malaysia) Sdn Bhd v. Yau Jiok Hua* [2006] 3 CLJ 27 (CA); *Kubota Agricultural Machinery Sdn Bhd v. Sharizan Sdn Bhd & Anor; Sharizan Sdn Bhd & Ors (Third Parties)* [2001] 6 CLJ 104 (HC); *Bespile Sdn Bhd v. Asianshine Sdn Bhd & Ors* [2010] 1 LNS 336 (HC); *Amalcon Engeneering Sdn Bhd v Saw Chong Teok Quarry Sdn Bhd* [2010] 1 LNS 485 (HC); *EON Finance Berhad v. United Bintang Machinery Sdn Bhd* [2010] 1 LNS 349 (HC); *JB Securities Sdn Bhd v. Goh Song Leong & Anor* [2010] 1 LNS 11 (HC); *Lim Guan Eng v. PP* [2000] 2 CLJ 541 (FC); *Kay Hian Pte Ltd v. Ma Boon Lan* [2003] 3 CLJ 722 [Civil Appeal No: Q-02-425-2001] (CA).

[14] The burden is on the plaintiffs to prove that payment for the Properties had been fully paid pursuant to s. 103 of the Evidence Act. However the plaintiffs had not discharged this burden as I find the contentions of the plaintiffs that they had fully paid for the properties is untenable and cannot be sustained for the following reasons.

[15] Firstly, under cross-examination PW1 has revealed that he did not have personal knowledge of the payment as he claimed; he is not a credible witness as he gave inconsistent evidence. This is evident from his evidence when asked to explain his testimony in evidence-in-chief regarding the payment for the purchase of the properties wherein he said "kami membayar melalui tunai …", PW1 testified in cross-examination:

(i) that he and the three other directors of the plaintiffs made cash payment to Cherating (1st defendant). This is borne out by:

Q: Please refer to Q & A 8. Can you clarify, who is 'kami'?

A: 'Kami' refers to the Companies Directors.

Q: Can you name the Company Directors?

A: Lau Kim Lai, Lau Kim Piaw, Lau Kim Kwee and Lau Yam Kwee. A

Q: Therefore all 4 of you paid cash?

A: Yes. The 4 of the directors paid cash.

B

(ii) he cannot remember the amount that was paid or his contribution towards the cash payment as alleged by him. This is borne out by:

Q: How much cash did you pay?

C

A: I cannot recall.

(iii) he has no knowledge of the business relationship between the plaintiffs and Cherating. This is borne out by:

Q: Do you have knowledge of the business relationship between the Plaintiffs and Cherating? D

A: Because it is handled by my late brother. I am not very clear.

(iv) he does not have the knowledge of the contra arrangement *vis-à-vis* the invoices that relates to the set-off and the contra. This is borne out by: E

Q: Refer to Q & A 12 of WS.

What did you mean by 'segala inbois'. What invoices were you referring to? F

A: The invoices are with regards to the contra arrangements.

Q: Is it your evidence that the information about the contra arrangement *vis-à-vis* the invoices are within the knowledge of your late brother and not you? G

A: Yes.

[16] However in re-examination:

(i) PW1 **changed** his version and now said "perkataan 'kami' merujuk kepada 'syarikat plaintiff'. Pembayaran tunai dan contra diuruskan antara syarikat plaintif dan syarikat defendan". H

(ii) When asked: I

S: Bila kamu kata pengarah-pengarah syarikat telah keluarkan wang untuk membayar pembayaran tunai dan kontra, apakah maksud "kami" bila kata pengarah keluarkan duit untuk bayar?

J: Semalam saya tidak berapa faham. Sebenarnya bila saya menyatakan pengarah-pengarah syarikat mengeluarkan tunai membuat bayaran menunjukkan yang dimaksudkan saya ialah Syarikat kami. Syarikat kami mempunyai wang yang telah disalurkan oleh pengarah. 'Pengarah have put in their own money into the company'. Maksud saya sekarang ialah syarikat kami membuat urusan bayaran dan contra with Defendant's company. (tekanan dibuat)

[17] If what PW1 said is true, it is indeed odd why he could not even remember how much cash he contributed as a director of the plaintiff companies in the light of his own explanation in re-examination that the directors 'have put in their own money into the company.' I am of the view that weight ought not to be given to the explanation of PW1 in the light of the evidence adduced under cross-examination referred to in para. 15(i) to (iv) above.

[18] Further, I find there is doubt in PW1's evidence as to whether the plaintiffs had indeed made payment for the properties as seen in the discrepancies found with regard to the signing of the SPAs and the impugned letter (IDP5) as shown below. (Q&A22 and Q&A30 in PW1's witness statement (WSPW1) pertaining to the impugned letters (IDP11 and IDP17) have been abandoned by the plaintiffs on 4 April 2011) but supplementary questions on IDP5, IDP11 and IDP17 were asked of PW1 in examination-in-chief instead.

(a) In examination in chief PW1 said that after he signed the SPAs, his late brother, Lim Kim Piaw informed him that Cherating had issued the impugned letters. However in cross-examination PW1 testified:

S11D: Pernahkah kamu melihat surat itu (IDP5)?

J: Masa sekarang ada. Dahulu di bawah tanggungjawab Lau Kim Piaw.

S11E: Bilakah kamu melihat surat itu (IDP5)?

J: Semasa adik saya [Lau Kim Piaw] menyuruh saya pergi menandatangani Perjanjian Jualbeli tersebut dan pada masa itulah saya melihat surat itu.

(Similar questions were asked with respect to IDP11 and IDP17 and similar answers were obtained).

(b) In cross-examination when asked to explain the discrepancy with regard to the impugned letter, PW1 said he saw the impugned letter simultaneously when he signed the SPAs and the impugned letter was brought to his attention by his late brother.

(c) However during re-examination, PW1 said:

S: Beritahu Mahkamah maksud kamu "Surat bertarikh 15.10.1998 diuruskan olih adik saya Lau Kim Piaw" Jelaskan.

J: Pada masa menandatangani Perjanjian antara Kean Yick Enterprise dengan Cherating, Cherating serahkan surat bertarikh 15.10.1998 kepada Lau Kim Piaw dan adik saya terus menyerahkan surat ini kepada saya.

[19] On a balance of probabilities, I find the evidence adduced points to the irresistible conclusion that it is highly improbable that the PW1 has any personal knowledge regarding the payment of the properties to the 1st defendant.

[20] As it is my finding that the plaintiffs have not proven that the properties had been fully paid, the plaintiffs' reliance on the case of *Sundram Ramasamy (supra)* is misplaced. In any event the 2nd defendant has adduced evidence to rebut the contents of the impugned letters.

[21] Woo Yew Khuen (DW1), Director of Woolley, signed the agreement for the transfer of land dated 22 September 2000 ("transfer agreement") (exh. P18 in bundle C1 pp. 1-80) on behalf of Woolley. DW2 testified that the purpose of the agreement for the transfer of land is to transfer the land to Woolley free of encumbrances subject only to charges created in favour of MBSB, from whom Cherating had obtained financial facilities for the development of the Project. Rosli bin Zainal Abidin (DW3), the General Manager and also Director of the Woolley testified the land was not transferred to Woolley but Cherating signed a power of attorney dated 26 September 2000 in favour of Woolley (exh. D47 in bundle C1 pp. 142-147) whereby Woolley was allowed to exercise all the rights and powers of Cherating as the registered proprietor of the land, including but not limited to signing the sale and purchase agreement, transfer documents, building plans and other documents that are necessary for the development of the project.

[22] Woolley did not receive any monies from Cherating as there was no money consideration involved when Woolley agreed to rehabilitate and complete the project (see recital J).

[23] DW2 who signed the deed of novation dated 21 June 2001 (exh. P19 in bundle C1 pp. 81-141) on behalf of Woolley testified that by the deed of novation was to novate the liabilities of Cherating to MBSB in respect of the financial facilities taken by Cherating unto Woolley subject to the terms of the deed.

[24] With respect to recital K(vii) and cl. 4.1(e)(vii) of the transfer agreement, DW2 testified that at the time the project was abandoned, Cherating had sold some of the shoplot units to individual purchasers particularised in Annexure H to the transfer agreement (bundle C1 pp. 29-54). Since Woolley was not a party to the sale and purchase agreements it was intended for Woolley, Cherating and the purchasers to execute an agreement to novate the sale and purchase agreements executed between Cherating and the purchasers. However Woolley executed fresh sale and purchase agreements with a substantial amount of the purchasers. DW2 and DW3 identified the list of purchasers from Annexure H who subsequently signed the sale and purchase agreements with Woolley are as listed in exh. D44 in bundle C1 pp. 219-232; the extracts of the sale and purchase agreements signed by the said purchasers are marked collectively as exh. P43 in bundle C2 pp. 413-552 whilst the complete set of the sale and purchase agreement appears at bundle C1 pp. 233-269 (exh. P31) and the remaining sale and purchase agreements are essentially the same (bundle C1 pp. 270-552 (exhs. P32-43)).

[25] DW2 stated the plaintiffs were not amongst the purchasers listed in Annexure H and Cherating did not inform Woolley of the SPAs signed between the plaintiffs and Cherating and he had no knowledge of the impugned letters.

[26] DW2 also stated after the terms of the deed of novation were agreed upon, Woolley began issuing letters to all purchasers listed in Annexure H in May 2001 notifying them that Woolley has taken over the project and inviting them to the office and such letters included exh. 45 (A-C) in bundle C3 pp. 8-10. However Woolley did not issue such a letter to the plaintiffs because the plaintiffs were not amongst the purchasers listed in Annexure H. This was confirmed by DW2, Miss Wang Keat Chean, the Business Development Manager of Woolley, who stated the late Lau Kim

Piaw contacted her sometime on 18 June 2001 after she had sent a letter dated 28 May 2001 (exh. D46 bundle B p. 2) addressed to his wife, Mdm Chan Soo Lee and all purchasers who had executed sale and purchase agreements with Cherating before Woolley took over the project. DW2 stated she responded to the late Lau Kim Piaw *vide* a fax (exh. P22 bundle B p. 1) giving the address of Woolley's Kuala Lumpur office. DW2 said she did not meet the plaintiffs or any representatives of the plaintiffs though she met some purchasers at Woolley's Kuala Lumpur office.

DW2 also said she has no knowledge of the SPAs which the plaintiffs claimed they had signed and had made full payment for and neither has she any of knowledge nor record of receipt of the plaintiffs' solicitors' letters (IDP20 in bundle D2 pp. 416-422).

[27] With respect to the admissibility of IDP5, IDP11 and IDP17 (the impugned letters), the plaintiffs' director resolution (IDP6 and IDP12), the plaintiffs' solicitor's letters dated 5 February 2002 (IDP20) and the financial statements of the plaintiffs (IDP25 to IDP29) ("all collectively called 'impugned documents'"), all these documents are in part C of the common bundle of documents, Bundle D1 and D2 which entail the makers being called to testify as the documents are disputed as to authenticity and contents.

[28] PW1 admitted that neither he nor the plaintiffs made any attempt to call Cherating's directors, the plaintiff's solicitors, the company secretary or the liquidator, Michael Joseph Monteiro (appointed on 18 June 2008 based on exh. P30, the corporate search on Cherating) to testify on the impugned letters and the impugned documents.

[29] Thus I find the plaintiffs did not adduce evidence to demonstrate that the exceptions to s. 73A and s. 32 are applicable as no evidence was adduced that the makers of the impugned letters and impugned documents were dead, or unfit to attend court as witness, or if the makers are beyond the seas and it is not reasonably practicable to secure their attendance, or if all reasonable efforts to find the makers have been unsuccessful. Having considered the cases cited by the plaintiffs (in para. 13 above), I find they can be distinguished and the circumstances in this instant case did not warrant the court to exercise its discretion in favour of the plaintiffs.

[30] Section 32(1)(b) of the Evidence Act states:

> (1) Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:
>
> (a) …
>
> (b) when the statement was made by any such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him.

[31] In *Tan Mooi (supra)* with regard to the interpretation to be accorded to the phrase "ordinary course of business" the Federal Court expressed, *inter alia*, it preferred to follow the Indian position (similar to s. 32(2) of the Indian Evidence Act) and stated:

> [40] Thus, from the authorities, it would appear that the declaration need not be in any formal business setting; it could be a communication between the husband and wife as in the case *Devi Singh & Ors v. Mt Phulma & Ors (supra)*. *What is crucial is whether it is the usual practice of the declarant to inform or discuss his or her affairs or business with the witness*. Therefore, it is **important to determine the relationship between the deceased and PW2**. (emphasis added).

[32] The Federal Court agreed with the learned trial judge "that the statement in issue was one made in the usual practice, habit or routine of the deceased in business" and came within the phrase "ordinary course of business" and fell within the scope of s. 32(1)(b) of the Evidence Act. However as alluded to before in this instant case, there is not a shred of evidence to prove that such a requirement has been amply met to enable the court to permit the impugned letters to be rendered admissible under s. 32(1)(b) of the Evidence Act.

[33] Further it is highly improbable for the impugned letters to be accepted as credible evidence since the plaintiffs were not listed as purchasers in Annexure H to the transfer agreement and besides, how could the impugned letters be issued in October 1998 when the project was abandoned in 1998. Even if the court is to take the date of abandonment of the project at its highest as at 31 December 1998, according to DW3, at the time when Woolley took over the project in 2001, Cherating had merely completed the piling works; the structural and building works had not been completed. So it begs the question of why would the plaintiffs want to pay the full purchase price when the project has not been completed?

[34] PW1 whom the plaintiffs relied on as their sole witness as I have shown above (paras. 15 to 19), apart from executing the SPAs, PW1 has no personal knowledge of the contents of the SPAs, of the impugned letters and when asked under cross-examination whether he has any evidence to support that payment towards the purchase price was partly by contra and by cash as alleged, he replied that it was handled by his late brother and he was still searching for the documents.

[35] For the reasons stated above I am of the view that the SPAs are void for want of consideration pursuant to s. 26 of the Contracts Act 1950 and are therefore unenforceable. On this ground alone on a balance of probabilities, I find the plaintiffs' claim ought to be dismissed.

Privity Of Contract

[36] In the event I err, I will now consider the privity of contract issue which essentially entails a determination of:

(a) whether in taking over the project, there is a contractual relationship between Cherating and Woolley?

(b) whether in taking over the project, Woolley is bound by the terms of the SPAs based on cls. 38(f) and 41 of the SPAs.

[37] It is not disputed that in all the SPAs the common clauses of 38(f) and 41 exist. Section 38(f) provides:

> 38. Interpretation
>
> In this Agreement, where the context so admits:
>
> (a) ...

A (b) ...

(c) ...

(d) ...

B (e) ...

(f) "Vendor" includes its successors in title and permitted assigns, in the context of the Bye Laws and Regulations hereinafter contained, the Vendor shall include the Managing Agent appointed and upon formation of the
C Management Corporation, the description shall refer to Management Corporation. (emphasis added).

[38] Section 41 provides:

41. Binding Effect of this Agreement

D (a) This Agreement shall be binding upon the successors in title and permitted assigns of the Vendor and the heirs, personal representatives, successors in title and permitted assigns of the Purchaser.

E **[39]** With regard to the successor in title issue, the 2nd defendant submitted for a corporation to be the successor of another, it has to be vested with the rights and duties of the earlier corporation and this process can be achieved either through amalgamation whereby Cherating amalgamates or consolidates with Woolley and
F ceases to be an entity of its own or alternatively through execution of agreements whereby Woolley assumes Cherating's interests in a particular venture or business in which case Cherating shall continue to exist as an entity. The 2nd defendant then submitted that Cherating did not amalgamate with Woolley and continued to
G exist as a separate entity and neither is it a permitted assign of Cherating.

[40] The plaintiffs however submitted that the 2nd defendant's argument does not water as it is not in line with the definition and
H approach by the courts in Malaysia. I am inclined to agree with the plaintiffs in this respect as the cases referred below show that our courts have taken a broader approach in the determination of what constitutes a "successor in title or permitted assign":

I (i) in cases involving tenancy, the term "successor in title or permitted assign" may involve a new purchaser of the property (*Praccom Sdn Bhd v. Malaysian Timber Council & Anor* [2010] 1 LNS 1307 (HC) where in a striking out

application the court held one of the issues was the onus of proof is on the 1st defendant to prove it is a *bona fide* purchaser; *Honest Deal Sdn Bhd v. Convenience Shopping Sdn Bhd* [2010] 10 CLJ 147) where the plaintiff filed an originating summons to seek relief that as the new purchaser it was not bound to the tenancy agreement that the vendor had with a previous tenant (the defendant);

(ii) in cases involving a vesting order of a bank, it includes the new bank taking over the business of the old bank *vide* the vesting order (*Bank Utama (Malaysia) Berhad lwn. Syrene Holdings Sdn Bhd & Yang Lain* [2010] 1 LNS 1526).

[41] The plaintiffs submitted that Woolley is the lawful successor in title and permitted assign of all the landed assets under the project by way of the transfer agreement. The plaintiffs relied on the Court of Appeal case of *Woolley Development Sdn Bhd v. Mikien Sdn Bhd* [2008] 2 CLJ 303 submitting that the issue of "privity of contract" was raised by Woolley but this issue was rejected by the Court of Appeal as being a triable issue.

[42] In *Mikien Sdn Bhd (supra)*, Woolley, the appellant and Mikien Sdn Bhd, the respondent were the 2nd defendant and plaintiff respectively in the court below whilst Cherating, the 1st defendant did not appeal. Woolley appealed against the decision of the learned Judicial Commissioner for summary judgment under s. 81 of the Rules of the High Court 1980. By a majority judgment, the Court of Appeal dismissed the appeal of Woolley and, *inter alia*, decided:

[50] It is noted, as submitted by learned counsel of the plaintiff, **that the 2nd defendant had never disputed that they are the successors in title and the permitted assigns of the 1st defendant**. Thus, by virtue of cls. 41 and 38(f), the SPA is binding upon the 2nd defendant.

[51] Under the Transfer Agreement, the 2nd defendant has unequivocally accepted and is obliged to "rehabilitate, continue to carry out the development, construction and completion of the project." We think that it matters not if the plaintiff's name is or is not listed in Annexure H. The breach for which the plaintiff is now seeking its remedy is for the failure of the 2nd defendant to complete this project and for the non-delivery of the commercial units to the plaintiff, **the purchase**

A **price of which had been fully paid**. In our view to say that there is no privity of contract between the plaintiff and the 2nd defendant is untenable. It is not a *bona fide* issue worthy of trial. (emphasis added).

B **[43]** Basically, in *Mikien Sdn Bhd (supra)*, in essence the Court of Appeal dismissed Woolley's appeal primarily for failing to dispute a positive averment by Mikien that Woolley was the successor in title and permitted assign of Cherating and that the purchase price had been paid in full.

C **[44]** In the instant case, prior to fixing this matter for trial, the plaintiffs had moved the court for summary judgment under O. 81 of the RHC (encl. 14). The court dismissed the plaintiffs' application by distinguishing *Mikien Sdn Bhd (supra)* and held it not binding principally on the ground that unlike in *Mikien Sdn*
D *Bhd (supra)*, in the application before me, Woolley had disputed that they are the successors in title and the permitted assigns of Cherating and thus cls. 41 and 38(f) of the SPAs is not binding on Woolley. In this regard I am of the view that the plaintiffs ought to be estopped from raising the argument with regard to the
E binding effect of *Mikien Sdn Bhd (supra)* on the principle of *res judicata* (*Everise Hectares Sdn Bhd v. Citibank Bhd* [2011] 2 CLJ 25 at pp. 32-34).

[45] In any event, after the conclusion of the trial, it is my finding
F no payment of the full purchase price has been made and the plaintiffs were not listed in Annexure H as alluded to above and therefore there was no privity of contract between the plaintiffs and Woolley.

G **[46]** The plaintiffs also relied on the case of *Golden Vale Golf Range & Country Club Sdn Bhd v. Hong Huat Enterprise Sdn Bhd* [2008] 6 CLJ 31. In this case (involving two appeals), a company, Airport Auto Centre Sdn Bhd, the 1st third party (in the court below), as beneficial owner, entered an agreement with the
H defendant (in court below and respondent in the appeal) to sell an undivided share in a piece of land at a purchase price of RM200,000. One Mdm Chun (appellant in the 2nd appeal and 2nd third party in the court below whilst 1st appeal is by the plaintiff) caused the land to be transferred to the plaintiff. Later the
I plaintiff brought an action against the defendant to recover vacant possession of the land and consequential relief. The defendant

counterclaimed seeking specific performance against the plaintiff, an order against Mdm Chun that she cause the plaintiff to specially transfer to the defendant the land and damages for breach of contract against Airport Auto. The learned judge dismissed the plaintiff's claim and entered judgment on the counterclaim against the plaintiff and Mdm Chun.

[47] On appeal, one of three grounds relied on by the plaintiff was the remedy of specific performance was not available to the that defendant advancing the argument that it was not a party to the agreement in question. The Court of Appeal held this ground to be without merit for two reasons. Firstly, there was a specific finding by the trial judge that the plaintiff was Mdm Chun's nominee and that Airport Auto was her agent and that the transfer of the land by Mdm Chun to the plaintiff was an attempt to evade contractual obligations that Airport Auto owed to the defendant under the said agreement and the corporate veil was lifted and the plaintiff and Airport Auto were held accountable. The 2nd reason which is pertinent to this proceedings, is that cls. 20 and 21 of the agreement in question bind both Airport Auto and the plaintiff as its successor in title. The clauses read:

> In this Agreement where the context so admits the term 'the Vendor' or 'the Purchaser' shall include their respective successor-in-title and permitted assigns and when there are two or more persons included in the term 'the Vendor' or 'the Purchaser' their liabilities under this agreement shall be joint and several. Words importing masculine gender shall be deemed and taken to include the feminine and neuter gender and the singular to include the plural and *vice versa*.
>
> This Agreement shall be binding upon the parties hereto their successor-in-title, permitted assign, heirs and personal representative respectively.

[48] As correctly submitted by the 2nd defendant the primary relief sought by the plaintiffs is specific performance of the SPAs ie, the delivery of vacant possession, which is a positive covenant agreed upon between the plaintiffs and Cherating. I am in agreement with the 2nd defendant that even if Woolley is the successor in title to Cherating, a burden or positive covenant agreed by Cherating cannot be imposed on Woolley. I find support in the case of *Rhone and Another v. Stephens (Executrix of May Ellen Barnard, deceased)* [1994] 2 AC 310 at pp. 316H, 317C-D, 318A-

A B, 320A-D and 321A where Lord Templeman (delivering judgment on behalf of the House of Lords) in dismissing the plaintiff's appeal at p. 311 stated:

> that although a negative covenant was enforceable in equity on the ground that it deprived the owner of a right over property and his successor in title was to be prevented from exercising a right which he had never acquired, **enforcement of a positive covenant against a successor in title would contradict the common law rule that a person could not be made liable upon a contract unless he was a party to it**; … 1960 conveyance to repair the roof was an independent provision which did not impose any reciprocal rights or benefits. (emphasis added).

[49] The facts in *Rhone's* case *(supra)* (as per headnotes) are that the owner of a house divided it into two separate dwellings. Part of the roof of the larger dwelling ("the house") lay above a bedroom in the smaller dwelling ("the cottage"). The owner retained the house and sold the cottage by a conveyance in which he covenanted "for himself and his successors in title … to maintain to a reasonable satisfaction of the purchasers and their successors in title such part of the roof of (the house) as lies above the property conveyed in wind and watertight condition." The condition of the roof deteriorated so that water leaked through into the cottage bedroom. The plaintiffs who had purchased the cottage by a conveyance containing an assignment of the benefit of the covenant brought an action to enforce the covenant against the defendant, the successor in title to the original owner of the house. The judge of the county court held that the plaintiffs were entitled to enforce the covenant but the Court of Appeal allowed the defendant's appeal.

[50] The plaintiffs had relied on the case of *Halsall And Others v. Brizell and Another* [1957] 1 All ER 371 as an exception to the concept of privity of contract in that a person who takes benefit of a covenant must accept the burden and also cited Judith Sihombing in *"Malaysian Conveyancing"* Binder 2 Issue 25 Division VI "Commentary on Conveyancing Matters" where the learned author stated at:

(i) paragraph 603:

> The *Halsall* case can be used extensively to pass benefits and burdens to successors in title of the original covenanting parties, regardless of the nature of the interest. **However,**

> **there are limitations on its effectiveness. Such a case was that of *Law Debenture Trust Corporation v. Ural Caspian Oil Corporation Ltd* [1993] 2 All ER 355, [1993] 1 WLR 138**. In that case, an agreement was entered into to acquire shares and to pursue a claim the assignor had against the Soviet government. The agreement was subject to a restrictive covenant that any assignee would pursue the claim, and compensate the original assignor for any recovery. **The shares were assigned several times but no mention was made of the restrictive covenant**. Compensation was paid to the current holder of the shares. The trustees of the original assignor sought recovery of that compensation. (emphasis added).

(ii) paragraph 605:

> Of course the effect of successful resort to Halsall would have meant that third parties were bound by a contract to which they were not parties; and this is an exception to the privity rule. Since that decision, the Contracts (Rights of Third Parties) Act 1999 (Cap 31) was enacted in England which clearly does abolish the doctrine of privity in many cases.

[51] The exception to the concept of privity was applied by Upjohn J in *Halsall*'s case *(supra)* known as the 'pure principle' *ie*, where a person (stranger to the contract) who takes or enjoys the benefits of the contract must also accept the burden under the contract was considered by Lord Templeman in *Rhone*'s case at p. 322 E-H and p. 323A. His Lordship stated:

> **I am not prepared to recognize the "pure principle" that any party deriving any benefit from a conveyance must accept any burden in the same conveyance** ... [In *Halsall v. Brizell*] the defendant's predecessor in title had been granted the right to use the estate roads and sewers and had covenanted to pay a due proportion for the maintenance of these facilities. It was held that the defendant could not exercise the rights without paying his costs of ensuring that they could be exercised. Conditions can be attached to the exercise of a power in express terms or by implication. *Halsall v. Brizell* was just such a case and I have no difficulty in wholeheartedly agreeing with the decision. *It does not follow that any condition can be rendered enforceable by attaching it to a right nor does it follow that every burden imposed by a conveyance may be enforced by depriving the covenantor's successor in title of every benefit which he enjoyed thereunder. The condition must be relevant to the exercise of the right. In Halsall v. Brizell there were reciprocal benefits and burdens enjoyed by the users of the roads and sewers*. In the present case clause 2 of the 1960 conveyance imposes reciprocal benefits

> and burdens of support but clause 3 which imposed an obligation to repair the roof is an independent provision. In *Halsall v. Brizell* the defendant could, at least in theory, choose between enjoying the right and paying his proportion of the cost or alternatively giving up the right and saving his money. In the present case the owners of [the house] could not in theory or in practice be deprived of the benefit of the mutual rights of support if they failed to repair the roof. (emphasis added)

[52] Following *Rhone*'s case *(supra)* I am of the view that the 'pure principle' cannot apply. I agreed with the 2nd defendant's submission that the contract is the SPAs. The benefit would be the purchase price whilst the burden is the obligation to construct and deliver vacant possession of the properties. However it is not disputed that Woolley never received the purchase price which the plaintiffs alleged they paid to Cherating. In any event, it is the court's finding that the full payment of the purchase price of the said properties have not been made.

[53] The aforesaid argument is fortified by the comments of the learned author, Judith Sihombing that the 'pure principle' applied in *Halsall*'s case *(supra)* has **"its limitations in effectiveness"** and to illustrate her point, she referred to the case of *Ural Caspian Oil Corporation Ltd (supra)*. It is observed that although the learned counsel for the plaintiffs referred to this case which appears in the passage he quoted at para. 603 from the learned author's book "Malaysian Conveyancing", he did not quote the passage *in toto*. I have set out the remaining portion of the passage which contains the facts of *Ural Caspian Oil Corporation Ltd (supra)* as italicized and highlighted in para. 50.

[54] To amplify further on the facts of the case, in *Ural Caspian Oil Corporation Ltd (supra)*, the shareholders of the first four defendants (the Russian companies), English-registered companies which had carried on business in Russia and whose assets had been confiscated and their claims for compensation rejected by the Soviet authorities, agreed to accept an offer by L Ltd for their entire share capital on condition that the Russian companies and L Ltd covenanted to pay any compensation subsequently obtained from the Soviet authorities to the plaintiff as trustee for the existing shareholders. L Ltd covenanted not to part with control of the Russian companies except on terms that the transferee entered into similar covenants. L Ltd later sold the shares in the Russian companies to the 5th defendant without requiring it to covenant with the plaintiff on the same terms. The 5th defendant later sold

the shares in the Russian companies to the 6th defendant without requiring it to covenant with the plaintiff on the same terms. In the meantime compensation totaling 13.2 million pounds was received by the Russian companies (the 1st to the 4th defendants) but none was paid to the plaintiff under the covenant. The plaintiff brought an action for damages against the six defendants. Thereafter the plaintiff applied to amend its statement of claim to include allegations that, because the 5th and 6th defendants took the shares with knowledge of the agreements and of their breach by L Ltd, each of them also took the burden of the covenants and was thereby under a legal or equitable obligation to perform them, and to add claims for relief by way of a positive injunction to that effect, or damages in substitution therefor, or alternatively orders requiring the retransfer of the shares to L Ltd with a view to compelling L Ltd to perform the covenants (see headnotes).

[55] Therefore one of the arguments canvassed by the plaintiff is the 'pure principle' in that he who takes the benefit of the transaction must also take the burden. In this context, Hoffmann J had considered the case of *Tito v. Waddell (No. 2)* [1977] 3 All ER 129 stating that Megarry VC recognised that without some limits, the 'pure principle' could subvert the doctrine of privity of contract and "proposed various limits" (p. 365 b-e). The plaintiff's application to amend the statement of claim was refused. At p. 365 e-f Hoffmann J stated:

> The right of the covenantee to enforce his covenant against an assignee therefore depends, perhaps rather curiously, upon the circumstances of a transaction to which he is not a party. *One must be able to infer from that transaction that the assignee was intended to assume the burden … Equally, no such inference can be drawn here. On the contrary, the plaintiff asserts that the whole object of the transaction was to ensure that Hilldon (5th defendant) and Caspian (6th defendant) would not be subject to the burden of the agreements*. In my judgment, therefore, the benefit and burden doctrine does not assist the plaintiff. (emphasis added)

[56] As I understand it, it is in this sense that the learned author, Judith Sihombing meant when she commented that in *Ural Caspian Oil Corporation Ltd (supra)* the 'pure principle' applied in *Halsall*'s case *(supra)* has "its limitations in effectiveness".

[57] In my judgment, it can be similarly argued and is an added reason why the *Halsall*'s case *(supra)* is not applicable in the present case, is because it is my finding that the plaintiffs are not listed as purchasers in Annexure H to the transfer agreement and neither had the plaintiffs entered into any new sale and purchase agreements with Woolley; Cherating did not inform Woolley of the SPAs signed between the plaintiffs and Cherating and consequently Woolley had no knowledge of the SPAs; and neither is there proof of payment of the full purchase price by Cherating.

[58] As for the principle in *Golden Vale Golf Range & Country Club Sdn Bhd (supra)*, it can be distinguished in that no arguments with respect to the issue of whether a positive covenant (obligation) can be imposed on a stranger, was discussed.

[59] For completeness, on the argument on bare or constructive trust, I am of the view it is irrelevant as the plaintiffs did not plead this as part of their pleaded case and neither did they lead any evidence to establish a trust.

[60] For the foregoing reasons, I had found on a balance of probabilities the plaintiffs have not proven their claims and thus dismissed the plaintiffs' claim with costs to be taxed unless otherwise agreed. On 13 July 2011, upon a clarification sought by the parties, it was ordered that the costs be borne equally by the plaintiffs in the three suits ie, Suits S22-1206-2006, S22-1208-2006 and S22-1209-2006.